IN THE COURT OF APPEALS OF TENNESSEE
AT NASHVILLE
July 7, 2004 Session

D.E. RYAN v. METROPOLITAN GOVERNMENT OF NASHVILLE AND DAVIDSON COUNTY, ET AL.

Appeal from the Circuit Court for Davidson County
No. 00C-3050 Thomas Brothers, Judge

No. M2003-01625-COA-R3-CV - Filed August 31, 2004

This is a zoning case wherein the Metropolitan Government of Nashville and Davidson County acting by and through the Metropolitan Board of Zoning Appeals contends that the trial court erred in ruling that the Appellant was without jurisdiction to rescind its prior decisions approving a property owner's application to reestablish a nonconforming use of certain property and associated site plan after expiration of the time allowed for appealing such decisions. The Appellant further argues that the trial court erred in holding that the property owner's right to utilize such property is protected under Tenn. Code Ann. § 13-7-208. We affirm in part, reverse in part and remand.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Circuit Court Affirmed in Part and Reversed in Part. Cause Remanded.

SHARON G. LEE, J., delivered the opinion of the court, in which HERSCHEL P. FRANKS, P.J., and D. MICHAEL SWINEY, J., joined.

J. Brooks Fox and John L. Kennedy, Nashville, Tennessee, for the Appellant, The Metropolitan Government of Nashville and Davidson County, et al.

George A. Dean, Nashville, Tennessee, for the Appellee, D.E. Ryan.

OPINION

I. FACTUAL BACKGROUND

The subject property in this case is owned by the Appellee, D.E. Ryan, and is located at 7242 Highway 70 South in Davidson County, Tennessee. The property was apparently used as a general store from the 1930's until 1973 when it became a women's apparel store. In 1974 a local zoning ordinance, designated the Comprehensive Zoning Ordinance (COMZO), was adopted and the property was zoned R15, a residential zoning classification. It appears that as of 1975 the property was being used as office space. In June of 1975, the Nashville Department of Codes Administration

granted Mr. Ryan's application to use a portion of the property for a Dairy Dip ice cream parlor. In 1978 a state road widening project interfered with access to the property and in 1979 the Department of Codes Administration granted an application by Mr. Ryan to convert that portion of the property occupied by the Dairy Dip to additional office space. In 1998, at Mr. Ryan's request, the property was re-zoned from R15 to the residential zoning classification of RM 20.

On March 1, 2000, Mr. Ryan submitted an application to the Metropolitan Board of Zoning Appeals (hereinafter "BZA") to re-establish the property's non-conforming use as a Dairy Dip. The BZA conducted a hearing on this application on April 6, 2000, and on April 11, 2000, entered an order approving the application subject to submission and approval of a site plan. Thereafter, Mr. Ryan submitted a site plan for the existing 1,363 square foot building wherein the Dairy Dip was located and such plan was approved by the BZA on May 4, 2000.

At some time later in 2000, Mr. Ryan submitted an application to replace the existing 1,363 square foot building on the property with a new 4,000 square foot building. This application was administratively denied and Mr. Ryan filed an appeal which was subsequently withdrawn. The BZA maintains that Mr. Ryan's request that he be allowed to construct the new building prompted its staff to further research the history of the subject site. After conducting this additional research, Rick Shepard, Secretary to the BZA, wrote Mr. Ryan a letter on October 4, 2000, indicating that relevant portions of Mr. Ryan's testimony before the BZA at the hearings on April 6 and May 4, 2000, were "inaccurate or misleading" and that "had [Mr. Ryan] provided correct information it could/would have affected the outcome of the case." The letter sets forth specific examples of these alleged inaccuracies or misrepresentations and indicates that evidence of such would be presented to the BZA on October 19, 2000. The letter further indicates that, if the BZA determines that it was presented with false information, Section 7.A.5 of the BZA Rules and Procedures allows it to reconsider its decisions of April 6 and May 4, 2000, and to revoke its approval of the re-establishment of Mr. Ryan's property as a Dairy Dip.

On October 19, 2000, the BZA concluded that there were inconsistencies in the record that would have affected its prior decisions and, on that basis, rescinded its approval of Mr. Ryan's application to reestablish the nonconforming use of his property as a Dairy Dip. Mr. Ryan appealed this ruling by filing a complaint in the Davidson County Circuit Court on the same date, which complaint was amended on November 20, 2000. On March 21, 2001, the Trial Court entered an order which construes the amended complaint to be a common law writ of certiorari.

Mr. Ryan's complaint denies any irregularities in the application or procedure before the BZA. The complaint further indicates that under rule 10(B) of the Rules of the Metro Board of Zoning Appeals any reconsideration by the BZA of its prior decision "must be made within 60 days of the original date of the entry of [its] order" and that reconsideration of its prior approval of Mr. Ryan's application is "illegal, arbitrary and capricious". The complaint also asserts that "the decision of the [BZA], having concluded that the plaintiff has a valid nonconforming use with respect to the property, any attempted revocation of that order is in violation of Tenn. Code Ann. §

13-7-208 which permits the owner of a nonconforming commercial use to continue, expand and reconstruct the facilities."

The case was heard on September 25, 2001, and on November 19, 2001, the Court entered an order remanding the case to the BZA "for a new hearing wherein the burden of proof is on the Department of Codes Administration to set forth the facts that it alleges were misleading and which warrant a rehearing by the MBZA so as to consider rescinding its earlier approval to allow the reestablishment of a Dairy Dip ... ."

At the hearing upon remand the BZA again rescinded its decisions of April 6 and May 4, 2000, and the case was again brought before the Trial Court on March 25, 2003. On April 23, 2003, the Court entered an order which decrees as follows:

> [I]t is the holding of this Court that the decision of the Metropolitan Board of Zoning Appeals rescinding its earlier finding of a non-conforming use is reversed because the rescission was beyond the jurisdiction of the board after 60 days expired from the original decision and also because there was insufficient evidence of any misrepresentation; the applicant may expand or reconstruct the facilities permitting a food service commercial activity.
>
> In addition, the Court ruled that Tenn. Code Ann.§ 13-7-208 applies to this property and that plaintiff has the right to utilize his property as permitted by the statute, including the expansion of the facility or construction of a new food service activity. The Tennessee Non-Conforming Property Act, TENN. CODE ANN. § 13-7-208 allows for such expansion, destruction and reconstruction of a nonconforming property.

The Metropolitan Government of Nashville and Davidson County (hereinafter "MGN") filed its notice of appeal to this order on June 30, 2003.

II. ISSUES FOR REVIEW

We address the following issues in this appeal:

1. Did the Trial Court err in finding that the BZA was without jurisdiction to rescind its approval of Mr. Ryan's application to re-establish the nonconforming use of his property?

2. Is Mr. Ryan's Dairy Dip ice cream parlor afforded the protections granted a business under Tenn. Code Ann.§ 13-7-208?

III. STANDARD OF REVIEW

As previously noted, this case involves the review of the BZA decision under common-law writ of certiorari. The proper standard of review applicable in a case such as this one was stated by this court in *Lafferty v. City of Winchester*, 46 S.W.3d 752 (Tenn. Ct. App. 2000) at page 758-759:

> In recognition of the policy that favors permitting the community decision-makers closest to the events to make their decision, the courts refrain from substituting their judgments for the broad discretionary power of the local government body.
>
> The common-law writ of certiorari provides the procedural vehicle for reviewing the decisions by local zoning boards. This writ affords quite limited judicial review. It empowers the courts to determine whether the local zoning board exceeded its jurisdiction; followed an unlawful procedure; acted illegally, arbitrarily, or fraudulently; or acted without material evidence to support its decision.
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> When the evidentiary foundation for a local zoning board decision is challenged using the common-law writ, the sufficiency of the evidence is a question of law. Hence, the courts must review the record de novo without presuming that the board's finding is correct. This review does not permit the courts to reweigh the evidence, or to scrutinize the intrinsic correctness of the decision. It envisions that the court will review the record independently to determine whether it contains "such relevant evidence that a reasonable mind might accept as adequate to support a rational conclusion." A decision by a local zoning board will be considered arbitrary only when there is no evidence in the record to support it. (Citations omitted.)

IV. JURISDICTION TO RESCIND

The first issue we address is whether the Trial Court erred in its finding that the BZA was without jurisdiction to rescind its prior approvals of Mr. Ryan's application to reestablish the nonconforming use of his property and associated site plan. Pursuant to the above stated standard, we are obliged to review the record for "such relevant evidence that a reasonable mind might accept as adequate to support [the] rational conclusion" that the BZA had jurisdiction to rescind its decisions.

Tenn. Code Ann. § 27-9-101 provides that anyone who may be aggrieved by a final order of a state board such as the BZA may have that order reviewed by the courts. Tenn. Code Ann. § 27-9-102 further provides that a party seeking such judicial review must file a petition of certiorari within 60 days of entry of the order in question. While both Mr. Ryan and MGN agree that a board such as the BZA has authority to revisit its decisions prior to the expiration of this 60 day period, MGN

contends that reconsideration of a decision even after the expiration of 60 days is permissible upon a showing of fraud, misrepresentation or mistake. Mr. Ryan disagrees and argues that under the law in Tennessee a state board may not revisit a decision once the 60 days have passed, even where there is proof of fraud, misrepresentation or mistake. Based upon our conclusions, set forth below, we find it unnecessary that we resolve this dispute.

MGN asserts that Mr. Ryan misrepresented facts which "caused the overall impression to the BZA to be that he had an on-going Dairy Dip as the primary use of this property and that he was forced to convert the Dairy Dip to real estate office space due to the State road-widening project taking away his access for the Dairy Dip." MGN argues that this impression was created by a letter to the BZA dated April 6, 2000, which was apparently written at the instruction of Mr. Ryan by his attorney, Robert Rutherford. Specifically, the BZA designates three portions of this letter as inaccurate and the BZA indicates that, absent its reliance upon these inaccuracies, it would not have approved Mr. Ryan's application to reestablish nonconforming use. These alleged inaccuracies are described and discussed by the BZA as follows:

> 1. "Early in 1973, the property was changed to a women's apparel store, until 1976, at which time the property began being used for a Dairy Dip ..." This was reiterated by Mr. Rutherford's statements to the BZA in the presence of the Plaintiff.
>
> Later in 2000, the BZA staff discovered that the Dairy Dip had only ever used one corner of the building, which amounted to 286 square feet (13' x 22' area) of the existing building. The staff also discovered that, even in 1975, the remainder of the building was used as a real estate office. There is a reference to the use as a "Real Estate office" in the Plaintiff's letter stamped "received" November 11, 1975. In November 1975, the plaintiff applied to the BZA for permission to place a 4' by 6' sign on an existing post for the real estate office.
>
> 2. "... at which time the property began being used for a Dairy Dip, again selling food products for on premise and off premise use." This was reiterated by Mr. Rutherford's statements to the BZA in the presence of the Plaintiff.
>
> The phrase "food products for on premise and off premise use" implies that there was seating available. However, as stated, later in 2000 the BZA staff discovered that the Dairy Dip had only ever used one corner of the building, which amounted to 286 square feet of the existing building, so it is highly doubtful that seating would be available.
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> 3. "In the late Fall of 1978, the State of Tennessee commenced a major road widening project for Highway 70 South. The nature of this project was such that ready access property to the building was cut off to the building which housed the Dairy Dip. The result of this restriction of access was to put the Dairy Dip out of

> business entirely. Rather than leave the building unused and its owner Mr. Ryan without any source of income during the time of the construction, the applicant changed the use to a real estate office..." This was reiterated by Mr. Rutherford's statements to the BZA in the presence of the Plaintiff, where he stated that the Dairy Dip was the "original use" and where he stated that the use was changed to real estate office by an "involuntary discontinuance" caused by the 1978 road-widening project.
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> However, as stated, later in 2000 the BZA staff discovered that, when the Plaintiff had applied to the BZA in November 1975, the primary use of the building was already a real estate office. In other words, it was discovered later in 2000 that the primary use in 1975 had been a real estate office long before the 1978 road widening project.
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> (citations to record omitted)

MGN points out that in 1975, when Mr. Ryan applied to the BZA to convert part of the building space to use as a Dairy Dip, he did so under the authority of the local zoning code. MGN argues that under applicable local zoning ordinances a proposed new nonconforming use must either be "less detrimental to the surrounding neighborhood that the existing non-conforming use" or must be "more compatible with surrounding land uses than the existing nonconforming use." MGN contends that the size of the proposed non-conforming use of the property, as compared to the size of the existing nonconforming use of such property, is relevant in determining whether the change will be compatible with, or result in a detriment to, the surrounding neighborhood. MGN maintains that "by allowing the BZA to believe incorrectly that the entire building had at one time been used as an 'ice cream parlor,' with on-premises seating, the Plaintiff was hoping the BZA would draw the conclusion that the former use of this entire location in this neighborhood was as an 'ice cream parlor' with an on-premise dining room; therefore, a restaurant use at this time probably is not detrimental and very well may be compatible." (Emphasis in original.)

MGN's argument that the statute of limitations governing its reconsideration of a prior approval is tolled in the event of fraud, misrepresentation or mistake is analogous to the argument that a statute of limitations should be tolled upon grounds that a cause of action was fraudulently concealed from a plaintiff by the defendant. Each argument is based upon the equitable maxim that one may not take advantage of one's own wrong. In *Pero's Steak and Spaghetti House v. Lee*, 90 S.W.3d 614, 625 (Tenn. 2002), the Tennessee Supreme Court stated that in order to establish a case of fraudulent concealment the plaintiff must, *inter alia,* prove that the allegedly concealed cause of action could not have been discovered despite the plaintiff's reasonable care and diligence. Analogously, it is our determination that the BZA's argument that it is not subject to the 60 day limitation on revisiting its prior decisions because of the alleged misrepresentations of Mr. Ryan fails absent proof that it could not have discovered the truth of the misrepresented matters despite its exercise of reasonable care and diligence.

Our review of the record reveals that the following letter, dated April 6, 2000, was addressed to the members of the BZA from zoning administrator, Lon West:

> Members of the Board of Zoning Appeals
> Howard Office Building
> 700 2nd Avenue South
> Nashville, TN 37201
>
> RE: Case #00-026 Map: 142 Parcel: 6
> 7242 Highway 70 South
>
> Dear Members:
>
> The above referenced property, containing 2.81 acres, has quite a history. This property was originally zoned "Agricultural" by Davidson County in 1965. At the time it contained a dwelling and a general store on the front, becoming non-conforming. Highway 70 South was a two-lane road at the time. This Board has dealt with the property on several occasions. The current owner petitioned the Board in 1975, soon after his purchase, to convert a portion of the store to a "dairy dip". This was approved and operated for a few years. When TDOT began their road-widening project the "dairy dip" was closed down. The owner then petitioned the Board to be allowed to convert the entire structure to office space, which was approved.
>
> The building was used and has been continually used as office space. In 1996 the owner then asked the Board for permission to convert a portion of the structure to retail sales, the original use of the building. This was denied. This case involves a request to re-establish the use as a "dairy dip"originally approved in 1975.
>
> Should the Board grant the request, we believe that some minimal traffic study should be done for approval by the Metro Traffic Engineer. Some landscaping and screening may be in order since the subject property and all surrounding property is zoned residential and used as such.
>
> Very truly yours,
>
> Lon F. West
> Metropolitan Zoning Administrator

It is apparently undisputed that this letter was presented to the BZA prior to the hearing on Mr. Ryan's application on April 6, 2000, and, accordingly, the BZA is charged with having

knowledge of the information contained in the letter when it approved Mr. Ryan's applications on April 6 and May 4, 2000. The letter clearly indicates that the BZA previously approved Mr. Ryan's 1975 petition to convert only *a portion* of the property to a Dairy Dip. The letter also specifically states that "[t]he building was used and *has been continually used* as office space." In light of this information provided by the zoning administrator we do not agree that the BZA can have been misled by the alleged inaccuracies referenced by MGN. To the extent that there was any conflict between the information set forth in Mr. West's letter and the information provided by Mr. Ryan, it is our determination that the BZA could have resolved such conflict by reviewing additional information in a Metro Map and Parcel file which was apparently available to the BZA and which contained the entire history of the subject site. The BZA argues that it "sits as a neutral body" and "is not under a duty to dig through the file box over in the corner and double-check every statement that is made." We do not advise the BZA as to what its duties are under all circumstances, however, under the facts of this case the BZA was presented with information from an applicant which, based upon the BZA's allegations, conflicted with statements made by the zoning administrator. Under these circumstances, the BZA's failure to review other documentation in its possession which would have revealed accurate information regarding the use history of the subject property and resolved any conflicts in information, constitutes a failure to exercise reasonable care and diligence. Accordingly, we find no merit in the BZA's argument that it had jurisdiction to revisit its prior approvals in this case beyond the 60 day limit upon grounds of mistake, fraud, or misrepresentation.

We have previously noted that the parties disagree as to whether the BZA has the right to revisit a prior approval after 60 days even upon a showing of fraud, misrepresentation or mistake. However, we need not resolve this dispute in view of our finding that, even if the BZA retains that right as a general matter, the facts of this case do not permit its assertion.

V. APPLICABILITY OF TENN. CODE ANN. § 13-7-208

The second issue we address is whether protections afforded a business under Tenn. Code Ann. §13-7-208 are available to Mr. Ryan with respect to the Dairy Dip.

Tenn. Code Ann. §13-7-208(b) provides as follows:

> In the event that a zoning change occurs in any land area where such land area was not previously covered by any zoning restrictions of any governmental agency of this state or its political subdivisions, or where such land area is covered by zoning restrictions of a governmental agency of this state or its political subdivisions, and such zoning restrictions differ from zoning restrictions imposed after the zoning change, then any industrial, commercial or business establishment in operation, permitted to operate under zoning regulations or exceptions thereto prior to the zoning change shall be allowed to continue in operation and be permitted; provided, that no change in the use of the land is undertaken by such industry or business.

Tenn. Code Ann. §13-7-208(c) further provides:

> Industrial, commercial or other business establishments in operation and permitted to operate under zoning regulations or exceptions thereto in effect immediately preceding a change in zoning shall be allowed to expand operations and construct additional facilities which involve an actual continuance and expansion of the activities of the industry or business which were permitted and being conducted prior to the change in zoning; provided, that there is a reasonable amount of space for such expansion on the property owned by such industry or business situated within the area which is affected by the change in zoning, so as to avoid nuisances to adjoining landowners. No building permit or like permission for construction or landscaping shall be denied to an industry or business seeking to expand and continue activities conducted by that industry or business which were permitted prior to the change in zoning; provided, that there is a reasonable amount of space for such expansion on the property owned by such industry or business situated within the area which is affected by the change in zoning, so as to avoid nuisances to adjoining landowners.

Recounting the history of the subject property, MGN notes that it was used as a general store until 1973 at which time it began to be used as a women's apparel store. With passage of COMZO in 1974, the property was zoned R15 which is a residential zoning classification. MGN observes that, with this change to residential zoning, the women's apparel store became a legally nonconforming use. In 1975 Mr. Ryan filed an application which was approved by the BZA, to change the use of a portion of the building to a Dairy Dip. MGN contends that, because the property was not used as a Dairy Dip until *after* the 1974 zoning of the property as residential, it does not qualify as a legally nonconforming use under Tenn Code Ann. § 13-7-208. Rather, MGN asserts that the use of the property as a Dairy Dip was a "change in use" and, as set forth in the last sentence of Tenn. Code Ann. §13-7-208(b), the protections offered by the statute are forfeited if "a change in the use of the land is undertaken by such industry or business." MGN contends that because Mr. Ryan "changed his use of the property and forfeited his protection under §13-7-208, he cannot now come back and claim to have the right to 'expand operations and construct additional facilities' for a Dairy Dip, or other food-service use, under §13-7-208(c)."

MGN additionally notes that in 1998, at Mr. Ryan's request, the property was further re-zoned from R15 to RM 20 which, according to zoning descriptions set forth at section 17.08.020 of the Metropolitan Code of Laws, constituted a change from residential zoning "for relatively low to moderate intensity single-family development" zoning "for moderately high intensity multifamily structures." MGN argues that under the language of Tenn. Code Ann. § 13-7-208(c) the right to "expand operations and construct additional facilities" is not available to a industry or business if it is not engaged in "an actual continuance and expansion of the activities of the industry or business which were permitted and being conducted prior to the change in zoning." MGN maintains that the Dairy Dip was not in operation immediately prior to the 1998 re-zoning and, accordingly Tenn. Code Ann. §13-7-208(c) does not provide authorization for expansion of that business.

Mr. Ryan states that the Dairy Dip is a commercial establishment which "was in operation and permitted to operate by virtue of the decision of the BZA in 1975" and that it would presumably still be in operation but for a state road widening project in 1978 which interfered with access to the property. Mr. Ryan contends that at the hearing on April 6, 2000, the BZA concluded that the Dairy Dip was a nonconforming use. Mr. Ryan asserts that "it is obviously impossible to be legally nonconforming without pre-existing the effective date of a change in zoning."

On April 6, 2000, the BZA granted Mr. Ryan the right to reestablish the previously existing nonconforming use of his property as a Dairy Dip. However, in arriving at its decision, the BZA made no finding that the Dairy Dip was in operation at the time of the change in zoning nor is it evident whether the change in zoning with respect to which the Dairy Dip was nonconforming was the zoning under COMZO in 1974 or the later zoning change of 1998. In light of the fact that the Dairy Dip was out of business in 1998, having been converted to office space by Mr. Ryan in 1979, it cannot be maintained that the Dairy Dip was a nonconforming use in 1998. The Dairy Dip no longer existed in 1998.

This Court has previously recognized that, in enacting Tenn. Code Ann. § 13-7-208, "[t]he goal of the legislature was to protect established businesses from later-enacted municipal zoning which would exclude them." *Outdoor West of Tennessee, Inc.*, v. *City of Johnson City,* 39 S.W.3d 131, 137 (Tenn. Ct. App. 2000). The Dairy Dip was not an established business in 1974 when the initial zoning change was implemented nor was it an established business in 1998 when the property was re-zoned to RM 20. Because the Dairy Dip was not established and in operation at the time of either of the zoning changes it is not possible that it was excluded by the changes. Tenn. Code Ann. § 13-7-208(b) and (c) are restricted in application to businesses "in operation." We construe this language to mean that the business in question must be in operation at the time of the zoning change. Under this construction it is our conclusion that the trial court erred in holding that Tenn. Code Ann. § 13-7-208 applies to the property in this case. It is our determination that Tenn. Code Ann. § 13-7-208 does not afford Mr. Ryan the right to expand the Dairy Dip or to construct a new facility relative to that business.

Finally, Mr. Ryan asserts that he is entitled to attorney fees in this case under the Tennessee Equal Access to Justice Act and/or the Federal Civil Rights Act. In his brief, Mr. Ryan makes the following statements with respect to this issue:

> This issue was not addressed by the lower court because a formal application was not made before the appeal was taken. However, Mr. Ryan intends, if successful on appeal to submit a request for such fees and does not wish to waive any right he any have to such fees. ... This issue is presented here only to avoid any potential waiver and may be unnecessary.

Mr. Ryan's assertion of his intention with respect to applications for attorney's fees that he may present to the trial court does not present a request for a determination by this court and we do not deem it to be an issue in this appeal.

V. CONCLUSION

For the foregoing reasons we reverse in part, affirm in part and remand for collection of the costs below. Costs of appeal are adjudged equally between D.E. Ryan and the Metropolitan Government of Nashville and Davidson County and its surety.

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SHARON G. LEE, JUDGE